

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ALAN W. PEASE,

Plaintiff,

v.

MICHAEL J. ASTRUE,
Commissioner of Social Security,

Defendant.

NO. SACV 07-00425 AGR

MEMORANDUM OPINION AND
ORDER

Alan W. Pease filed this action on April 17, 2007. Pursuant to 28 U.S.C. § 636(c), the parties filed Consents to proceed before Magistrate Judge Rosenberg on April 24 and May 21, 2007. On December 10, 2007, the parties filed a Joint Stipulation ("JS") that addressed the disputed issues. The Court has taken the matter under submission without oral argument.

Having reviewed the entire file, the Court reverses the Commissioner's decision and remands for further proceedings consistent with this Opinion.

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1 I.

2 **PROCEDURAL BACKGROUND**

3 On August 26, 2003, Pease filed applications for disability insurance
4 benefits and supplemental security income benefits. A.R. 73-75. The
5 applications were denied initially and on reconsideration. A.R. 47-65. Pease
6 requested a hearing. A.R. 66. The Administrative Law Judge ("ALJ") conducted
7 hearings on January 18, 2006, and September 11, 2006. A.R. 303-337. On
8 October 19, 2006, the ALJ issued a decision denying benefits. A.R. 9-21. On
9 November 28, 2006, Pease filed a request for review of the ALJ's decision. A.R.
10 7. On March 12, 2007, the Appeals Council denied the request for review. A.R.
11 4-6. This lawsuit followed.

12 II.

13 **STANDARD OF REVIEW**

14 Pursuant to 42 U.S.C. § 405(g), this Court reviews the Commissioner's
15 decision to deny benefits. The decision will be disturbed only if it is not supported
16 by substantial evidence, or it is based upon the application of improper legal
17 standards. *Moncada v. Chater*, 60 F.3d 521, 523 (9th Cir. 1995); *Drouin v.*
18 *Sullivan*, 966 F.2d 1255, 1257 (9th Cir. 1992).

19 "Substantial evidence" means "more than a mere scintilla but less than a
20 preponderance – it is such relevant evidence that a reasonable mind might
21 accept as adequate to support the conclusion." *Moncada*, 60 F.3d at 523. In
22 determining whether substantial evidence exists to support the Commissioner's
23 decision, the Court examines the administrative record as a whole, considering
24 adverse as well as supporting evidence. *Drouin*, 966 F.2d at 1257. When the
25 evidence is susceptible to more than one rational interpretation, the Court must
26 defer to the Commissioner's decision. *Moncada*, 60 F.3d at 523.

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1 III.

2 DISCUSSION

3 “A person qualifies as disabled, and thereby eligible for such benefits, ‘only
4 if his physical or mental impairment or impairments are of such severity that he is
5 not only unable to do his previous work but cannot, considering his age,
6 education, and work experience, engage in any other kind of substantial gainful
7 work which exists in the national economy.’” *Barnhart v. Thomas*, 540 U.S. 20,
8 21-22, 124 S. Ct. 376, 157 L. Ed. 2d 333 (2003) (citation omitted).

9 A. The ALJ’s Findings

10 The ALJ found that Pease had the following severe impairments: “history of
11 herniated nucleus pulposus at C6-7 with spinal cord compression, status post
12 cervical discectomy and fusion at C5-6, lumbar disc degeneration and disc space
13 narrowing, status post lumbar laminectomy and fusion at L4-5, and bilateral
14 vestibulopathy.” A.R. 20. The ALJ found that Pease has the residual functional
15 capacity to perform “a significant range of light work.” A.R. 21. He found that
16 Pease had the following residual functional capacity: “lifting and/or carrying 10
17 pounds frequently and 20 pounds occasionally; sitting for 6 hours total in an 8-
18 hour workday with normal breaks; standing and/or walking for 4 hours total in an
19 8-hour workday with normal breaks; occasional bending, stooping, crouching,
20 crawling and reaching overhead; and total restriction from climbing, balancing,
21 and working around unprotected heights, dangerous machinery, fast moving
22 machinery, and vibrating tools.” A.R. 20.

23 The ALJ found that Pease could not perform any of his past relevant work.
24 *Id.* However, Pease could perform work as a cashier II (DOT 211.462-010),
25 office clerk (DOT 239.564-010) and various assembler jobs. A.R. 21.

26 B. Plaintiff’s Right to Counsel and Development of the Record

27 A social security [recipient] has a statutory right, which may be waived, to
28 be represented by counsel at a hearing before an ALJ.” *Graham v. Apfel*, 129

1 F.3d 1420, 1422 (11th Cir. 1997) (per curiam); *Binion v. Shalala*, 13 F.3d 243,
2 245 (7th Cir. 1994); 24 U.S.C. § 406.

3 However, “absence of counsel alone [is] not sufficient grounds for remand.”
4 *Hall v. Sec’y of Health, Education and Welfare*, 602 F.2d 1372, 1378 (9th Cir.
5 1979) (citation omitted). “The claimant must demonstrate prejudice or unfairness
6 in the administrative proceedings to be entitled to relief by way of remand.” *Id.*
7 (citations omitted). “[T]he issue is not whether the right to representation was
8 knowingly waived, rather, it is whether, in the absence of representation, the
9 administrative law judge met the heavy burden imposed by *Cox*.” *Vidal v. Harris*,
10 637 F.2d 710, 714 (9th Cir. 1981). In *Cox*, the court held that when the claimant
11 is unrepresented, the ALJ must “scrupulously and conscientiously probe into,
12 inquire of, and explore all relevant facts,” and he must be “especially diligent in
13 ensuring that favorable as well as unfavorable facts and circumstances are
14 elicited.” *Cox v. Califano*, 587 F.2d 988, 991 (9th Cir. 1978) (citations and
15 internal quotation marks omitted).

16 Pease concedes that he waived his right to counsel. JS 4; A.R. 305-308,
17 320-321. However, Pease contends that he was prejudiced by lack of
18 representation because the ALJ failed to properly develop the record.
19 Specifically, Pease argues that the ALJ (1) failed to obtain medical records after
20 August 2003; (2) failed to inquire why Pease stopped receiving treatment; and (3)
21 ignored the medical expert’s testimony that Pease’s heart rate required a
22 cardiology workup.

23 **Medical Records.** The record does not indicate that there are any medical
24 records after August 2003. At the January 18, 2006 hearing, Pease confirmed
25 that he reviewed the file. A.R. 309. The ALJ specifically asked Pease whether
26 there are any documents not in the file that Pease felt the ALJ should have in
27 order to make an informed decision. Pease responded, “No, sir.” *Id.* Pease
28 further testified that he is not being treated by a doctor. A.R. 310. At the

1 September 11, 2006 hearing, Pease again testified that he had the opportunity to
 2 review his file. A.R. 321. Pease testified that he was not being treated by a
 3 doctor. A.R. 324. At no time did Pease indicate there are any missing medical
 4 records.¹

5 ***Inquiry as to Why Pease Stopped Receiving Treatment.*** The record
 6 demonstrates that the ALJ inquired as to Pease's reasons for not seeking
 7 treatment. At the January 18, 2006 hearing, the ALJ asked whether Pease had a
 8 treating physician. Pease responded that he did not have medical insurance and
 9 had no way of getting any medical treatment. A.R. 314. The ALJ again inquired,
 10 "And you have no way to see any type of doctor at all?" A.R. 316. Pease
 11 responded, "No, sir, no." *Id.* At the September 11, 2006 hearing, the ALJ asked
 12 Pease why he was not being treated by a doctor. A.R. 324. Pease responded
 13 that he had been to a lot of doctors when he first started having problems and
 14 has tried every avenue he could think of. *Id.* Pease does not provide any
 15 indication that the record is incomplete in any way.

16 ***Medical Expert's Testimony.*** At the January 18, 2006 hearing, the
 17 medical expert, Dr. Mason, testified based on a review of the medical records.
 18 Dr. Mason testified that Pease "has not had an appropriate evaluation by a
 19 specialist that would be indicated based upon his symptoms." A.R. 311. Dr.
 20 Mason noted two occasions in the medical records on which Pease's heart rate
 21 was 51 and 45, respectively. A.R. 312. A heart is considered normal if it is
 22 between 60 and 100 beats per minute. A.R. 313. Dr. Mason considered that
 23 Pease had "a serious bradycardia or cardiac arrhythmia" which could be a cause

24 ¹ Pease cites his testimony that his last trip to an emergency room for
 25 a blackout took place "like three, a couple years ago." A.R. 324. Three years
 26 prior to the hearing would be 2003, whereas two years would mean 2004. Given
 27 that Pease was unsure as to the year, this equivocal testimony does not
 28 constitute evidence that additional medical records exist. Moreover, Pease bears
 the burden of furnishing medical and other evidence of disability. 42 U.S.C. §
 423(d)(5). Pease offers no explanation as to why he has never sought to admit
 any additional records to the ALJ, the Appeals Council or this Court.

1 of the dizziness Pease experienced. A.R. 312-313. The ALJ clarified: "So you're
2 suggesting that he needs further workup." A.R. 313. Dr. Mason responded: "He
3 needs a cardiac work-up. That's all. And I don't think we should proceed until we
4 have that done." *Id.* The ALJ stated that he would send Pease out for further
5 evaluation at government expense. A.R. 314.

6 Pease argues that the ALJ ignored Dr. Mason's testimony that he be sent
7 to a specialist for a cardiac workup (JS 10), and instead sent him to an internist
8 who did not give him a cardiac workup. A.R. 294-298. The ALJ noted that,
9 according to the internist, Pease had a pulse of 68 and a regular heart rhythm.
10 A.R. 16, 296. However, there is nothing in the record to indicate that Pease was
11 given a cardiac workup or that the internist was even aware of a potential cardiac
12 problem. See A.R. 294-296.

13 An ALJ must develop the record when the evidence is ambiguous or "the
14 record is inadequate to allow for proper evaluation of the evidence." *Mayes v.*
15 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d
16 1144, 1150 (9th Cir. 2001). Here, Dr. Mason testified that Pease "has not had an
17 appropriate evaluation by a specialist that would be indicated based upon his
18 symptoms." A.R. 311. Furthermore, Dr. Mason testified that he did not think that
19 the ALJ should proceed further until the cardiac work-up was done. A.R. 313.
20 Because the record does not establish that the ALJ sent Pease to a specialist or
21 that Pease received a cardiac work-up, the ALJ did not fully and fairly develop the
22 record. See *Tonapetyan*, 242 F.3d at 1150 (physician found it "difficult to say"
23 whether medical record was complete enough and stated he would "have to see
24 more evidence" before rendering an opinion) (internal quotation marks omitted).

25 On remand, the ALJ should develop the record and send Pease to a
26 cardiologist for a cardiac workup. The ALJ should then conduct further
27 proceedings, as necessary, for a Step Five determination.

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1 **C. Pease's Credibility**

2 Given that this matter is being remanded to the Commissioner for further
3 proceedings, the Court does not reach the issue of Pease's credibility, which
4 must be assessed in light of the entire record. On remand, the ALJ may revisit
5 the issue of Pease's credibility in light of any additional evidence in the record.

6 **IV.**

7 **ORDER**

8 IT IS HEREBY ORDERED that the decision of the Commissioner is
9 reversed and remanded for further proceedings consistent with this Opinion.

10 IT IS FURTHER ORDERED that the Clerk of the Court serve copies of this
11 Order and the Judgment herein on all parties or their counsel.

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14 DATED: April 17, 2008

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16 ALICIA G. ROSENBERG
17 United States Magistrate Judge
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